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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 796

WALTER A. MACK, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1A-11A) is reported at 249 F. 2d 321.

JURISDICTION

The judgment of the Court of Appeals was entered on October 10, 1957 (Pet. 1A) and a petition for rehearing was denied on December 23, 1957 (Pet. 13A). By order of Mr. Justice Clark, the time for filing a petition for a writ of certiorari was extended

to and including February 19, 1958. (Pet. 14A.) The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed plain error by inquiring, some nine hours after the case was submitted to the jury, how many jurors thought a verdict could be reached.

2. Whether, in admitting in evidence a deposition of a deceased employee of petitioner, the trial court committed reversible error in excluding as incompetent an attached *ex parte* affidavit of the employee not sought to be used for impeachment purposes.

3. Whether the trial court abused its discretion in refusing to sever the two counts charging petitioner with attempted evasion of his individual income taxes from the two counts charging him with attempted evasion of the corporate income taxes.

STATUTE AND RULES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to

evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * *

(26 U.S.C. 1952 ed., Sec. 145(b).)

Federal Rules of Criminal Procedure:

Rule 15. Depositions

* * * *

(f) *Objections to Admissibility.* Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

Federal Rules of Civil Procedure:

Rule 26. Depositions Pending Action

* * * *

(e) *Objections to Admissibility.* Subject to the provisions of Rule 32(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

* * * *

Rule 32. Effect of Errors and Irregularities in Depositions

* * * *

(c) *As to Taking of Deposition*

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure

to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

* * * *

STATEMENT

On January 12, 1954, petitioner was indicted in the United States District Court for the Northern District of Illinois on two counts, alleging the wilful attempted evasion of large parts of the 1947 income taxes of W. A. Mack, Inc., and large parts of petitioner's 1947 individual income tax. (R. 5-6.)[1] On September 3, 1954, a similar two-count indictment was filed against petitioner with respect to the year 1948. (R. 16-17.) After a jury trial on both indictments, petitioner was found guilty on Count One, relating to the 1947 income taxes of W. A. Mack, Inc. The jury was unable to agree as to the remaining three counts. (R. 1461b-1461c.) On May 23, 1956, petitioner was sentenced to imprisonment for a year and a day. (R. 1475-1476.)

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[1] References are to the three-volume appellant's appendix in the Court of Appeals, which has been certified to this Court.

The evidence to support the verdict, the sufficiency of which is unchallenged, may be summarized briefly as follows:

Throughout 1947 petitioner was president and general manager of Walter A. Mack, Inc., an automobile agency dealing in new and used cars. The capital stock was all held in the names of petitioner, his wife and children. (R. 195-196, 203, 1371-1373.) Petitioner had full charge of setting the corporation's policies and running the business, and was thoroughly familiar with the details of its operation. (R. 1151, 1325, 1371.) His sales manager was Russell O. Bahlenhorst, who made the daily deposits in the corporation's bank account but who had no authority to sign checks. (R. 178, 1150-1151, 1152.)[2]

The Government proved, by the testimony of many purchasers of new and used cars, that during 1947 the corporation had earned $48,700.18 of income not reported on its income tax return. Of this amount, $16,531.38 was received from two dealers who bought new cars from the corporation, dealing with petitioner personally. They paid the invoiced amounts by check and the overage in currency, some of which was paid to Bahlenhorst at petitioner's direction. (R. 608-624, 700-708, 920, 926.)[3] An ad-

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[2] Bahlenhorst, finding that strangers had difficulty with his name, usually introduced himself to customers as B. O. Russell. (R. 179, 1150-1151.)

[3] Shortly after one of these witnesses had appeared before the grand jury, petitioner offered to return his money if he would sign affidavits to the effect that he had purchased certain cars at the invoice price. (R. 707.)

ditional $21,687.80 of unreported income arose from sales to dealers who received one car less than those listed on the invoices. The undelivered cars would then be sold to third parties. (R. 925.) Finally, it was shown that there was another $10,481 of unreported income, consisting mainly of under-the-table premiums received on the sale of used cars. (R. 926.)

In addition to the $48,700.18 of unreported corporate income described above, the Government contended that the corporation had improperly claimed as deductions a total of $13,585.87 in checks made payable to fictitious payees and charged on the books and tax return as commissions. (R. 919, 920, 1018, 1020, 1154-1155, 1166-1171, 1347-1350.) The total understatement of income as claimed by the Government was $62,086.05. (R. 927.)

The case went to the jury late in the afternoon of March 19, 1956. (R. 1433, 1459.) At 1:10 the next morning the court recalled the jury (R. 1461, 1473) and the following colloquy took place (R. 1461-1461b):

> The Court: Without telling the Court how you stand, the Court would like an indication whether there is a prospect of your agreeing on a verdict. How are you progressing?
>
> Foreman Of The Jury: I suppose I speak for the jury. We are progressing, but we are not near any final result. I will put it that way.
>
> The Court: Have you taken ballots?
>
> Foreman Of The Jury: We have taken a number of ballots. I would say we have perhaps taken six or eight, approximately.
>
> The Court: How many of you believe that you will agree on a verdict or will be able to?

Foreman Of The Jury: I don't know, I couldn't answer for anybody but myself.

(Raising of hands by jurors.)

A Juror: We will agree one way or the other.

A Juror: Judge, do you think we are taking too much time with this?

The Court: No. I don't want to hurry you. It is a little after one o'clock. Suppose you go back for another hour and try it.

Foreman Of The Jury: At the end of the hour, Judge?

The Court: I don't know. I will make no commitment at this time.

A Juror: We are sorry to keep you up so late, Judge.

Foreman Of The Jury: We want to do a good job and give everybody a chance to be heard.

The Court: All right. Go back and see if you cannot agree on a unanimous verdict.

(The jury retired to the Jury Room, whereupon the following proceedings were had out of the presence and hearing of the jury:)

Mr. Calihan [Assistant United States Attorne]: I would like to make a statement in the record. I don't think there was any indication but that all twelve jurors raised their hands. They indicated that they thought a verdict would be possible. I think all of them had their hands raised. So, at least, there is some encouraging sign.

The Court: I thought around seven or eight.

Mr. Levinson [Defense Counsel] There was one definitely did not.

Mr. Calihan: I looked at them. I thought they all did.

The Court: Some of them raised their hand lightly and put it right down.

Mr. Crowley [Defense Counsel]: I think they believe they can reach a unanimous agreement if each agrees with the other.

The Court: I think we will give them at least another hour and see how they progress.

Two hours later, at 3:10 a.m., the jury returned a verdict of guilty on the first count and stated that it was unable to agree on the other three counts. (R. 1461b-1461c.)

ARGUMENT

1. Petitioner's first contention (Pet. 10-16) is that the trial judge's inquiry of the jurors, after they had deliberated for some nine hours, as to how many believed they would be able to agree on a verdict (*supra*, pp. 6-7), was coercive. The argument is without merit.[4] It is, of course, settled that a trial judge's inquiry as to the numerical division of a jury is coercive and hence constitutes reversible error. *Brasfield* v. *United States*, 272 U. S. 448. But no such inquiry was made here. Indeed, the judge expressly cautioned the jury at the outset of the colloquy *against* revealing its numerical division. Cf. *Tomoya Kawakita* v. *United States*, 190 F. 2d 506, 526 (C. A. 9th), affirmed on other grounds, 343 U. S. 717. The inquiry was simply as to whether the jurors believed they would be able to agree. It did not relate to how the jurors were divided on the issue of petitioner's guilt or innocence or disclose which or how many jur-

[4] No objection to the court's question was made at the time, nor was the point raised on the motion for new trial, which was argued five weeks later. (R. 1472-1473, 1474.) Apparently, defense counsel did not consider the incident prejudicial at the time.

ors were in the minority on that question. The inquiry related solely to the prospect for reaching a unanimous verdict. This inquiry, as the Court of Appeals found (Pet. 5A), was one of a "distinctly different character" than that in the *Brasfield* case, and those in the other cases relied upon by petitioner (Pet. 15). We submit that the trial judge's question did not infringe upon the secrecy of the jury's deliberations, was not coercive, and served the useful purpose of apprising the court generally of the progress that was being made and the likelihood of a verdict.[8]

2. Petitioner urges (Pet. 16-19) that the trial court erred in excluding from evidence an affidavit signed by the corporation's sales manager, Bahlenhorst, several weeks before his deposition was taken. The argument has no substance. The affidavit was dated January 15, 1954, the deposition was taken on February 27, 1954, and Bahlenhorst died on March 2, 1954, some two years before the trial. (Pet. 16, 17, 15A-16A, R. 185-186.) At the close of the direct examination of Bahlenhorst at the deposition, defense counsel had him identify the affidavit and state that it was correct. (R. 1162-1163.) However, the affidavit was not offered until after the cross-examination at the deposition had been completed. (R. 1175.) The docu-

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[8] In commenting on the coercive nature of an inquiry as to the division of the jury on the issue of guilt or innocence, this Court clearly implied that questions of the type asked here are permissible. The Court wrote, "Such procedure serves no useful purpose *that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division.*" *Brasfield* v. *United States*, 272 U.S. at 450 (emphasis added.)

ment, which was not sought to be used for impeachment purposes, was plainly incompetent, even though attached to the deposition by the reporter. (Pet. 17, R. 1176-1178.) Under Rules 26(e) and 32(c) of the Federal Rules of Civil Procedure (*supra*, pp. 3-4), made applicable by Rule 15(f) of the Federal Rules of Criminal Procedure (*supra*, p. 3), the Government's objection at the trial was timely, because the error was not of the "kind which might be obviated, removed, or cured if promptly presented" at the time the deposition was taken. Even if objection had then been made, the affidavit would still have been incompetent. Moreover, if defense counsel had wished to examine Bahlenhorst about the matters contained in the affidavit he had ample opportunity to do so. Indeed, most of the twenty-six pages of Bahlenhorst's deposition (R. 1150-1175) relate to the commission checks made payable to fictitious payees (*supra*, p. 6), the subject which constitutes virtually all of the one and one-half page affidavit (Pet. 15A-16A). Only one sentence in the affidavit relates to a matter not covered by Bahlenhorst's testimony, and it is upon the exclusion of this sentence that petitioner must necessarily rely for his claim of prejudice (Pet. 16A):

> I further state that at no time during 1946, 1947 or 1948 did I ever turn over any currency to Walter A. Mack or W. A. Mack, Inc. which allegedly represented over-invoice payments from used car dealers or new or used car customers arising out of sales by me to them of new or used cars.

Whatever appearance of importance this sentence may have is superficial. The evidence showed that of the $48,700.18 of unreported gross receipts, a maximum of only $7,706 could have been received by Bahlenhorst in currency on account of cars *sold by him* (supra pp. 5-6, R. 926), and, in the light of his deposition testimony (R. 1154, 1168-1174), it is reasonable to believe that any such cash went into the "slush fund" (R. 1154) Bahlenhorst maintained on behalf of the corporation by petitioner's authority (R. 1174). We submit that the *ex parte* affidavit of Bahlenhorst was properly excluded from evidence and that, in any event, its exclusion could not have prejudiced petitioner.*

3. Equally without merit is the contention (Pet. 19-21) that the trial court abused its discretion in refusing to sever the corporate tax counts from those involving petitioner's personal taxes. The crimes are of the same class and the proof of each revolved almost entirely around the corporation's sale of auto-

* It should be noted that Bahlenhorst's deposition testimony on cross-examination regarding the false commission checks (R. 1163-1174) completely dispels the impression conveyed by his affidavit (Pet. 15A-16A), *i.e.*, that Bahlenhorst was engaged in falsifying corporate checks, that he converted the proceeds to his own use, and that neither petitioner nor the corporation received the benefit of them. In view of this fact, and in view of the importance now sought to be placed on the single sentence in the affidavit relating to cash overages, defense counsel's failure to examine Bahlenhorst on the latter subject may well have been deliberate, impelled by the fear that here again the effect of the carefully worded affidavit would be destroyed by Bahlenhorst's testimony.

mobiles. This is precisely a situation which calls for one trial rather than two. *United States* v. *Hall*, 52 F. Supp. 796, 797 (Conn.) and cases cited; *United States* v. *Martell*, 104 F. Supp. 140, 142-143 (E. D. Pa.), reversed on other grounds, 199 F. 2d 670 (C.A. 3), certiorari denied, 345 U. S. 917.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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